88-703

Supreme Court, U.S.
FILED
OCT 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE CELOTEX CORPORATION and
RAPID-AMERICAN CORPORATION,
Petitioners,

v.

SMITH LAND & IMPROVEMENT CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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October 28, 1988

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Court of Appeals required by this Court's rulings on Federal Rule of Civil Procedure 56 to affirm summary judgment if alternative, narrower grounds exist for doing so?

2. May a company not otherwise liable succeed through merger to environmental liabilities for real property sold by its predecessor years before the merger under a statute, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), which did not exist at the time of the merger and which expressly limits liability to certain enumerated parties?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
OPINIONS BELOW	4
STATEMENT OF JURISDICTION	5
STATUTORY PROVISIONS AND COURT RULES INVOLVED	5
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
I. *THE COURT OF APPEALS IGNORED THIS COURT'S DECISIONS CONCERNING RULE 56 BY REFUSING TO AFFIRM A SUMMARY JUDGMENT ON THE ALTERNATIVE AND NARROWER GROUNDS WHICH EXISTED*	8
II. *THERE IS NO SUPPORT FOR EXPANDING SECTION 107(a) OF CERCLA TO IMPOSE LIABILITY ON SUCCESSORS TO THE ENUMERATED POTENTIALLY RESPONSIBLE PARTIES ESPECIALLY WHERE SUCH LIABILITY IS IMPOSED FOR CONDITIONS ON REAL PROPERTY SOLD BY THE PREDECESSOR YEARS BEFORE THE MERGER AND ARE CREATED BY A STATUTE WHICH DID NOT EXIST AT THE TIME OF THE MERGER*	13
A. The Plain Language of CERCLA Does Not Support Imposing Successor Liability	13
B. The Legislative History of CERCLA Demonstrates That Successor Liability Should Not Be Imposed	15

TABLE OF CONTENTS – *(Continued)*

Page

C. The Imposition of Successor Liability Under CERCLA Where the Predecessor-Successor Relationship Arises After the Property in Question Is Sold Could Paralyze Corporate Mergers. 19

CONCLUSION. 21

APPENDIX A-1

RULE 28.1 STATEMENTS. A-1

TEXT OF COURT RULES INVOLVED A-2

TEXT OF STATUTORY PROVISIONS INVOLVED A-3

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (851 F.2d 86) A-5

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT A-19

ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Order Denying Rehearing and Rehearing In Banc, Dated August 1, 1988 . . . . . A-21

Order Staying Issuance of Certified Judgment in Lieu of Mandate Until November 6, 1988, Dated August 22, 1988 . . . . . A-22

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA IN SMITH LAND & IMPROVEMENT CORPORATION V. RAPID-AMERICAN CORPORATION. A-23

TABLE OF CONTENTS – *(Continued)*

Page

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA IN SMITH LAND & IMPROVEMENT CORPORATION V. THE CELOTEX CORPORATION A-31

REPORT OF MAGISTRATE OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA IN SMITH LAND & IMPROVEMENT CORPORATION V. RAPID-AMERICAN CORPORATION A-35

REPORT OF MAGISTRATE OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA IN SMITH LAND & IMPROVEMENT CORPORATION V. THE CELOTEX CORPORATION A-44

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 10

Bernitsky v. United States, 620 F.2d 948 (3d Cir.), *cert. denied*, 449 U.S. 870 (1980) 9

Cadillac Fairview/Cadillac, Inc. v. Dow Chemical Company, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20376 (C.D. Cal. March 5, 1984), *rev'd on other grounds*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 20470 (D.C. Cir. February 25, 1988) 18, 19

Celotex v. Catrett, 477 U.S. 317 (1986)..... 2, 10

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980)..... 15

Frey & Son v. Cudahy Packing Co., 256 U.S. 208 (1921) 9

Helvering v. Gowran, 302 U.S. 238 (1937), *reh'g denied*, 302 U.S. 781 (1938)..... 2, 9

Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986) 18

Langnes v. Green, 282 U.S. 531 (1931) 9

Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd sub nom. Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985)..... 12

New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) 17, 18

Oner II, Inc. v. EPA, 597 F.2d 184 (9th Cir. 1979) 17

Philadelphia Electric Co. v. Hercules, Inc., 762 F.2d 303 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985) 6, 7

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Stelos Co. v. Hosiery Motor-Mend Corp., 295 U.S. 237 (1935) 9

T & E Industries, Inc. v. Safety Light Corp., 680 F. Supp. 696 (D.N.J. 1988) 19

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 15

United States v. American Railway Express Co., 265 U.S. 425 (1924) 9

United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987) 19

United States v. Conservation Chemical Co., 619 F. Supp. 162 (W.D. Mo. 1985) 18

United States v. Holt State Bank, 270 U.S. 49 (1926) 9

United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983) 18

United States v. Williams, 278 U.S. 255 (1929) ... 9

Statutes:

28 U.S.C. §1254(1) 5

28 U.S.C. §1331 5

42 U.S.C. §9607(a) ..... *passim*

42 U.S.C. §9613(f)(1) ..... *passim*

29 U.S.C. § §1369, 1384, 1398 16

30 U.S.C. §932 16

26 U.S.C. §468(B) 16

26 U.S.C. §6901 16

TABLE OF AUTHORITIES – *(Continued)*

Statutes: Page

Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613 (1986) 16

Court Rules:

56(c) Fed. R. Civ. P..... 5, 10

804(b)(1) Fed. R. Evid..... 12

Legislative Materials:

H. Rep. No. 99-253(I), 99th Cong., 2d Sess.1, 55, *reprinted in* 1986 U.S. Code Cong. & Ad. News 2835, 2837 3

H. Rep. No. 96-1016, Part 1 96th Cong., 2d Sess. 1, 29, *reprinted in* 1980 U.S. Code Cong. & Ad. News 6119, 6132 16

Other Authorities:

10A J. Wright, A. Miller, M. Kane, *Federal Practice and Procedure,* §2727 (2d ed. 1983)..... 10

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTRODUCTION

Petitioners seek the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *Smith Land & Improvement Corporation v. The Celotex Corporation, Smith Land & Improvement Corporation v. Rapid-American Corporation,* 851 F.2d 86 (3d Cir. 1988), which vacated summary judgment in favor of The Celotex Corporation

("Celotex") and Rapid-American Corporation ("Rapid-American") and remanded the case to the United States District Court for the Middle District of Pennsylvania. This was an action brought by Smith Land & Improvement Corporation ("Smith Land") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.*, for reimbursement of certain response costs Smith Land incurred to abate asbestos on property sold to it in 1963 by the Philip Carey Manufacturing Company ("Philip Carey"), a company which ceased to exist in 1967 as a result of mergers.

This Court recently held that the plain language of Rule 56(c) of the Federal Rules of Civil Procedure mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett,* 477 U.S. 317, 322 (1986). Moreover, this Court has long held that Rule 56 requires an appellate court to affirm on any alternative grounds which establish that the movant is entitled to judgment as a matter of law. *Helvering v. Gowran,* 302 U.S. 238, 245 (1937), *reh'g denied,* 302 U.S. 781 (1938).

Petitioners submit that the Third Circuit abdicated its responsibility under Rule 56 by not deciding the more narrow and dispositive question which would have provided the court with an alternative basis on which to affirm the district court's entry of summary judgment for petitioners. As such, the Third Circuit's decision conflicts with decisions of this Court as to the standard of review of district courts' grants of summary judgment.

Further, with no support in either case law or legislative history, the Third Circuit extended the reach of section 107(a) of CERCLA and concluded that it was meant to include successors to the enumerated potentially responsible parties. Thus, it held that the general

doctrine of corporate successor liability is appropriate in CERCLA contribution claims. 851 F.2d at 92. Although the Court stated that "Congressional intent" supported the view that such liability should be imposed, nowhere did the court identify the source of such "Congressional intent". *Id.*

The impact of the Third Circuit's unwarranted expansion of liability under CERCLA to include all successors to all potentially responsible parties is far from theoretical. As Congress itself has noted,

> The Office of Technology Assessment now estimates there may be as many as 10,000 Superfund sites across the Nation, or an average of 23 sites per Congressional district. These sites range from industrial plants to river beds to city dumps where small businesses and households have disposed of solvents, paints and cleaning fluids. We now understand that a cleanup frequently goes far beyond simple removal of barrels. If often involves years of pumping contaminated water from aquifers. The total cost of completing the Superfund program is estimated to be as much as $100 billion. The total time will be decades.

H. Rep. No. 99-253(I), 99th Cong., 2d Sess. 1, 55, *reprinted in* 1986 U.S. Code Cong. & Ad. News 2835, 2837. The Third Circuit has concluded that Congress intended to impose this enormous liability on the corporate successor to every party enumerated in section 107(a) of CERCLA, regardless of its nexus, or lack thereof, to the property in question.

The Third Circuit's broad holding is likely to produce a chilling effect on mergers. A party contemplating a merger will not only have to inquire into and investigate the possible contamination of the target company's current land holdings; it will also have to investigate the possible contamination of the target company's prior land holdings, though currently owned by someone else,

and the possible contamination of the target company's predecessors' land holdings. In many cases, such a burdensome and costly inquiry is impossible. Section 107(a) of CERCLA clearly and unequivocally limits its reach to the four enumerated parties. The Third Circuit's extension of section 107(a) to include successors to such parties could not have been contemplated by Congress.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at *Smith Land & Improvement Corporation v. The Celotex Corporation, Smith Land & Improvement Corporation v. Rapid-American Corporation,* 851 F.2d 86 (3d Cir. 1988).

The opinions of the United States District Court for the Middle District of Pennsylvania have not been published in any official reporters. Citations for the two opinions are *Smith Land & Improvement Corporation v. Rapid-American Corporation,* No. 86-0116 (M.D. Pa. September 21, 1987) and *Smith Land & Improvement Corporation v. The Celotex Corporation,* No. 86-1151 (M.D. Pa. September 22, 1987). The district court's opinion regarding the Rapid-American case appears in an unofficial reporter, the citation for which is *Smith Land & Improvement Corporation v. Rapid-American Corporation,* 18 Envtl. L. Rep. (Envtl. L. Inst.) 20769 (M.D. Pa. September 21, 1987).

The district court initially submitted the two cases to Magistrate Smyser for his recommendation. Magistrate Smyser's reports have not been published. Citations for these reports are *Smith Land & Improvement Corporation v. Rapid-American Corporation,* No. 86-0116 (M.D. Pa. June 16, 1987) and *Smith Land & Improvement Corporation v. The Celotex Corporation,* No. 86-1151 (M.D. Pa. June 16, 1987).

STATEMENT OF JURISDICTION

Petitioners seek review of the judgment of the United States Court of Appeals for the Third Circuit. This judgment was entered on June 30, 1988. The Third Circuit denied petitioners' Petition for Rehearing in Banc on August 1, 1988. This Petition is filed within ninety days of the denial of rehearing. The appellate jurisdiction of this Court is based on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND COURT RULES INVOLVED

This case involves consideration of sections 107(a) and 113(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980. It also involves consideration of Rule 56(c) of the Federal Rules of Civil Procedure. The text of the statutory provisions and rule cited above are set forth in full in the Appendix.

STATEMENT OF THE CASE

In this action, Smith Land seeks reimbursement from Celotex and Rapid-American under CERCLA for certain costs it incurred to abate asbestos on real property which it purchased in 1963 from the Philip Carey Manufacturing Company ("Philip Carey") and which is located in Plymouth Meeting, Pennsylvania.[1] Smith Land incurred such costs in responding to a demand for remedial measures made by the Environmental Protection Agency ("EPA") in 1984. In the complaints in these consolidated actions, Smith Land alleged that the district court has subject matter jurisdiction pursuant to 28 U.S.C. §1331 and 42 U.S.C. §9613.

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1. Smith Land's immediate predecessor, Exeter Investment, Inc. ("Exeter"), was the actual purchaser of the property. Smith Land's current president, Richard Jordan, was Secretary of Exeter at the time of this purchase and was active in the negotiations at the time of the purchase. Smith Land currently occupies the property.

It is undisputed that Celotex and Rapid-American never owned the property at issue. Celotex's only connection with Philip Carey, the alleged contaminator[2], arose in 1972, nine years after Philip Carey sold the property, when Celotex, through a series of corporate mergers, acquired an interest in Philip Carey. Rapid-American's involvement is more tenuous – it did not even come into existence until 1972, nine years after the conveyance.[3]

The property at issue is a 160-acre tract of land. The subject of the litigation is a 20-acre, 30-foot high pile of limestone material alleged to contain asbestos. It is also undisputed that Smith Land inspected the property several times before the purchase, considered the pile a "negative" factor in the decision to purchase, and was provided with and failed to avail itself of the opportunity to perform test borings on the property prior to the conveyance.

On this basis and relying on the Third Circuit's decision in *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir.), *cert. denied,* 474 U.S. 980 (1985), the United States District Court for the Middle District of Pennsylvania, following the conclusion of discovery, entered summary judgment for Celotex and Rapid-American and denied summary judgment for Smith Land. On June 30, 1988, the Court of Appeals for the Third Circuit entered an order vacating the judgments of the district court.

The only basis for Smith Land's appeal of the district court's entry of summary judgment for Celotex and

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2. There is no admissible evidence which shows that Philip Carey was responsible for disposing of the asbestos on the subject property. *See infra* at pp. 10 to 13.

3. This was the result of a merger between an Ohio Rapid-American and Glen Alden Corporation. By this time Glen Alden (into which Philip Carey did not merge until June 1, 1967) had already transferred all the assets and liabilities of Philip Carey.

Rapid-American and its denial of partial summary judgment for Smith Land was the district court's conclusion that the *caveat emptor* defense, as approved by the Third Circuit in *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir.), *cert. denied,* 474 U.S. 980 (1985), barred Smith Land from its right to recover contribution from Celotex and Rapid-American under CERCLA.

In the Third Circuit, Celotex and Rapid-American not only addressed the *caveat emptor* defense, the only legal issue raised by Smith Land, but also renewed arguments, both factual and legal, raised before the district court as to why the entry of summary judgment for Celotex and Rapid-American was appropriate and why it would have been inappropriate as to Smith Land.

The Third Circuit considered only the single and rather broad legal issue which Smith Land put before the Court, disregarded the other more narrow, dispositive issues raised by Celotex and Rapid-American in their appellate briefs and abdicated its responsibility under this Court's prior holdings which required it to affirm on other grounds. Because these other narrow issues provided alternative grounds for affirming the district court's decision, and because the Third Circuit's broad pronouncement regarding successor liability under CERCLA could have a paralyzing effect on future corporate transactions, Celotex and Rapid-American petitioned the Third Circuit for a rehearing in banc.

On August 1, 1988, the Third Circuit denied rehearing and rehearing in banc.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS IGNORED THIS COURT'S DECISIONS CONCERNING RULE 56 BY REFUSING TO AFFIRM A SUMMARY JUDGMENT ON THE ALTERNATIVE AND NARROW GROUNDS WHICH EXISTED

The sole issue addressed by the Third Circuit in its opinion in this case is that of successor liability under CERCLA. This issue becomes important only if the liability of the predecessor is established. Celotex and Rapid-American presented as a more narrow, but nonetheless dispositive, alternative ground for affirming the district court's entry of summary judgment the fact that Smith Land had offered no admissible evidence to show that Philip Carey, the alleged predecessor, would have been liable under CERCLA.[4] The Third Circuit expressly refused to consider this ground. In so doing, the Third Circuit ignored two lines of well-established Supreme Court cases. The first line consists of those cases which hold that an appellate court must affirm a lower court's decision if there is any ground for affirmance, even if the ground relied upon by the lower court is a wrong one. The second line of cases are those which hold that a court must enter summary judgment for a moving party where no admissible evidence has been presented on an issue essential to the opposing party's case.

In response to Celotex's and Rapid-American's argument that there was no admissible evidence as to Philip Carey's liability under CERCLA, the Third Circuit

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4. Philip Carey no longer exists as a separate corporation. Celotex and Rapid-American are alleged to have succeeded to Philip Carey's liabilities through a series of statutory mergers. Thus, the only way Celotex and Rapid-American can be deemed to have succeeded to CERCLA liabilities is if Philip Carey would have been liable under CERCLA, were Philip Carey still in existence today.

stated only: "[w]e assume at this juncture – but absent findings do not decide – that [Philip] Carey produced the scrap pile that precipitated the EPA action." 851 F.2d at 90. The Third Circuit's refusal to consider this alternative ground is inconsistent with the Supreme Court's pronouncement in *Helvering v. Gowran,* 302 U.S. 238 (1937), *reh'g denied,* 302 U.S. 781 (1938): "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." 302 U.S. at 245 (citing *Frey & Son v. Cudahy Packing Co.,* 256 U.S. 208 (1921); *United States v. American Railway Express Co.,* 265 U.S. 425 (1924); *United States v. Holt State Bank,* 270 U.S. 49 (1926); *Langnes v. Green,* 282 U.S. 531 (1931); *Stelos Co. v. Hosiery Motor – Mend Corp.,* 295 U.S. 237 (1935); *United States v. Williams,* 278 U.S. 255 (1929)).[5]

Had the Third Circuit considered the alternative basis presented to it for affirming the district court's decision – i.e., the inadmissibility of evidence presented to support Smith Land's burden of proof – it would have had to conclude, consistent with other Supreme Court precedent, that the entry of summary judgment for Celotex and Rapid-American and the denial of partial summary judgment for Smith Land was appropriate.

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5. The Third Circuit's refusal to consider the narrow alternative ground presented by Celotex and Rapid-American for affirming the district court's decision also fails to pay heed to circuit court decisions following *Helvering,* and in particular, the Third Circuit's own decision in *Bernitsky v. United States,* 620 F.2d 948, 950 (3d Cir.), *cert. denied,* 449 U.S. 870 (1980). In *Bernitsky,* the court refused to affirm the entry of summary judgment on the purely legal ground forming the basis of the district court's decision, but instead affirmed on a factual ground, concluding that summary judgment was appropriate because of the absence of disputed facts.

This Court held in *Celotex v. Catrett,* 477 U.S. 317 (1986), that summary judgment for the moving party is mandated where there is insufficient evidence to establish the existence of an element on which the non-moving party bears the burden of proof:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

As to what constitutes a "sufficient" showing, this Court held in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986), as follows:

> The inquiry performed is the threshold inquiry as to whether there is a need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

477 U.S. at 250. Implicit in this Court's requirement, that the evidence which the non-moving party produces present a triable issue for a jury, is the requirement that such evidence be admissible. *See* 10A J. Wright, A. Miller, M. Kane, *Federal Practice and Procedure* §2727 (2d ed. 1983) (Rule 56(e) requires the adversary to set forth facts that would be admissible in evidence).

In this case, Smith Land had come forward with no admissible evidence on an issue essential to its case at the time discovery was closed (which was prior to the filing of summary judgment motions) and has not come forward with any such evidence at any time thereafter. In order to support its burden of proof on the issue of Philip Carey's liability under CERCLA, Smith Land

should have come forward with admissible evidence to show that Philip Carey owned the property now belonging to Smith Land at the time of disposal of the asbestos-containing waste, or that it transported such wastes on its property.[6] In opposition to both Celotex's and Rapid-American's Motion for Summary Judgment, and on its own Motion for Partial Summary Judgment as to Celotex,[7] the only evidence which Smith Land came

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6. Section 113(f)(1) of CERCLA, on which Smith Land bases its claims against Celotex and Rapid-American for contribution, provides that any "person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title." 42 U.S.C. §9613(f)(1). Section 9607(a), in turn, enumerates four categories of potentially liable parties: the current landowner (section 9607(a)(1)), the hauler of hazardous substances on property not its own (section 9607(a)(3)), the transporter of hazardous substances (section 9607(a)(4)), or the landowner on whose property hazardous substances were once deposited during the period of his ownership (section 9607(a)(2)). Since Smith Land has nowhere alleged or argued that Philip Carey is the current landowner, or hauled hazardous waste on property not its own, the only conceivable bases for considering Philip Carey's liability is as an owner of the property at the time of disposal (section 9607(a)(2)) or as a person who accepts any hazardous substances for transport (section 9607(a)(4)).

7. Neither Celotex nor Rapid-American moved for summary judgment on the absence of admissible evidence to show that Philip Carey would have been liable under CERCLA. This ground was a basis for Smith Land's own Motion for Partial Summary Judgment against Celotex, however. Smith Land's failure to come forward with any admissible evidence to demonstrate Philip Carey's requisite involvement not only defeats Smith Land's Motion for Partial Summary Judgment, (the denial of which was a basis for Smith Land's appeal to the Third Circuit), but also mandates the entry of summary judgment for Celotex on this issue. *See generally* 10A J. Wright, A. Miller, M. Kane, *Federal Practice and Procedure* §2720 (2d ed. 1983) ("[t]he grant of judgment for the non-moving party clearly is proper if both sides agree that there are no material fact issues and join in the request that the case be decided, for the moving or the non-moving side, on the basis of a motion for judgment made by only one of them").

While Smith Land never formally moved for summary judgment as to Rapid-American, it did so informally in its opposition to

forward with was a few pages of trial testimony from an unrelated personal injury action against Celotex. *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd sub nom. VanBuskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985). The *Neal* case was brought by former Philip Carey employees seeking to recover for injuries received allegedly as a result of their exposure to asbestos during their employment at Philip Carey's Plymouth Meeting plant. The trial testimony offered was that of Harry Belz, one of the plaintiffs in that action, during which he stated that he dumped asbestos-containing materials onto Philip Carey's property while in Philip Carey's employ.

As argued below, such testimony is inadmissible hearsay as it relates to both Celotex and Rapid-American. Under Rule 804(b)(1) of the Federal Rules of Evidence, the former testimony of an unavailable declarant[8] is admissible only where:

> . . . the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor-in-interest, had an opportunity and similar motive to develop testimony by direct, cross or redirect examination.

Fed. R. Evid. 804(b)(1). Because Rapid-American was not a party to the *Neal* case in which Mr. Belz testified, it had *no* opportunity to cross-examine him. Therefore, Mr. Belz's testimony is inadmissible hearsay as it relates to Rapid-American.

Mr. Belz's testimony is also inadmissible hearsay as it relates to Celotex. Since the *Neal* case in which Mr. Belz testified did not require resolution of the issue of

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NOTES *(Continued)*

Rapid-American's Motion for Summary Judgment, where it asked the district court to grant summary judgment in its favor. Thus, the entry of summary judgment for Rapid-American is also appropriate.

8. Mr. Belz is now deceased.

whether Philip Carey disposed of asbestos on the subject property (and in fact the court made no such finding on this issue), but only whether Mr. Belz and others were exposed to asbestos, Celotex did not have the requisite motive to conduct any extensive cross-examination of Harry Belz on this issue.

This absence of admissible evidence on the issue of Philip Carey's role with respect to the asbestos found on Smith Land's property constituted an appropriate ground for affirmance of the district court's entry of summary judgment for both Celotex and Rapid-American. The Third Circuit erred both by failing to consider this ground and by ignoring Supreme Court precedent mandating the entry of summary judgment in such circumstances.

II. THERE IS NO SUPPORT FOR EXPANDING SECTION 107(a) OF CERCLA TO IMPOSE LIABILITY ON SUCCESSORS TO THE ENUMERATED POTENTIALLY RESPONSIBLE PARTIES ESPECIALLY WHERE SUCH LIABILITY IS IMPOSED FOR CONDITIONS ON REAL PROPERTY SOLD BY THE PREDECESSOR YEARS BEFORE THE MERGER AND IS CREATED BY A STATUTE WHICH DID NOT EXIST AT THE TIME OF THE MERGER

A. The Plain Language of CERCLA Does Not Support Imposing Successor Liability

Smith Land is proceeding against Celotex for contribution under section 113(f)(1) of CERCLA, 42 U.S.C. §9613(f)(1) (Supp. 1987). This provision states, in pertinent part, that "[a]ny person may seek contribution from any other person *who is liable or potentially liable under section 9607(a) of this title.*" 42 U.S.C. §9613(f)(1) (emphasis supplied). As is apparent from the plain language of this provision, a determination of whether a party is potentially liable under section

107(a) is preliminary to any determination of whether that party may be held liable to another for contribution.

The four classes of potentially liable persons under CERCLA as defined by section 107(a) are:

> (1) The owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, . . .

42 U.S.C. §9607(a) (in pertinent part).

It is undisputed that Celotex and Rapid-American do not fall into any of these categories. Celotex never owned or operated the subject property, never arranged for the disposal of the hazardous substances discovered by the EPA on Smith Land's property, and never accepted such substances for transport; Celotex had no relationship whatsoever with Philip Carey, the prior owner, until 1972, nine years after the subject property had been conveyed to Smith Land's predecessor, Exeter

Investment, Inc. ("Exeter"). Rapid-American did not come into existence until 1972.

It is likewise undisputed that CERCLA contains no provision for imposing liability upon the corporate successors to the four enumerated categories of potentially responsible parties set forth in section 107(a), 42 U.S.C. §9607(a). Thus, the Court of Appeals' interpretation of the statute violates the very language of the statute.

This Court has often invoked the "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). This Court has further held that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979).

In this case, the statute clearly limits liability to the four enumerated parties. If Congress had intended to include successors, it clearly could have said so.

B. The Legislative History of CERCLA Demonstrates That Successor Liability Should Not Be Imposed

Despite the clear and conclusive language of the statute, the Third Circuit held that "Congressional intent" supports the view that such liability should be imposed. 851 F.2d at 92. More specifically, the Third Circuit stated that "Congressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost." *Id.* Beyond the fact that the Third Circuit failed to identify any source of such congressional intent, this statement incorrectly assumes that situations will frequently arise where the only possible party upon whom the EPA may shift the costs of clean-up will be the successor to the party responsible for contaminating the

property. That is not the present situation, where there is a current landowner, and in fact will rarely, if ever, be the situation, given CERCLA's elaborate provision for cost recovery by the EPA from one of four potentially responsible parties: the current landowner (section 107(a)(1)), the hauler of hazardous substances (section 107(a)(3)), the transporter of hazardous substances (section 107(a)(4)), or the landowner on whose property hazardous substances were once deposited during the period of his ownership (section 107(a)(2)).

If any Congressional intent can be gleaned from the statutory scheme itself, it would be that section 107(a) of CERCLA was not intended to apply to successors in light of Congress's already detailed and comprehensive enumeration of potentially responsible parties. Despite the extensive amendments to CERCLA in 1986, which were intended to address and correct problems arising out of experience with the Act, no changes were made to expand the list of responsible parties. *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).[9]

Moreover, the Third Circuit cites no legislative history for its view that it is "the thrust of the legislation to

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9. Moreover, originally Congress contemplated only two categories of "responsible parties": (1) persons who owned or operated the facility at the time of disposal; and (2) generators or parties disposing of hazardous waste at the facility. H. Rep. No. 96-1016, Part I, 96th Cong., 2d Sess. 1, 29, *reprinted in* 1980 U.S. Code Cong. & Ad. News 6119, 6132. Congress later expanded the definition of potentially responsible parties by adding the two additional categories which the current statute includes. Had Congress intended to impose liability on successors, it could have done so between the issuance of the House Report and the final enactment of CERCLA.

Finally, there are numerous statutory examples of Congress expressly including provisions imposing liability on corporate successors. *E.g.*, 29 U.S.C. §§1369, 1384, 1398 (Employee Retirement Income Security Act of 1974); 30 U.S.C. §932 (Mine Safety & Health Amendments Act of 1977); 26 U.S.C. §468(B) (Tax Reform Act of 1986); 26 U.S.C. §6901 (Internal Revenue Code).

permit — if not require — successor liability under traditional concepts." 851 F.2d at 91. The only authority cited is *Oner II, Inc. v. EPA,* 597 F.2d 184 (9th Cir. 1979). That case is inapposite for several reasons. First, that case construes the Federal Insecticide, Fungicide and Rodenticide Act, not CERCLA. Secondly, two of the Ninth Circuit's justifications for imposing successor liability in that case were: (1) the fact that the successor was aware of its predecessor's violations of the Act at the time it succeeded to the interests of the predecessor, and (2) the fact that the successor continued in the business of distributing pesticides.

In the present case, neither Celotex nor Rapid-American were aware of any CERCLA violations at the time of the relevant mergers, because, *inter alia,* in 1972 CERCLA did not exist. Moreover, neither Celotex nor Rapid-American ever occupied Philip Carey's property; that property, prior to the relevant mergers, had been sold to Smith Land.

Accordingly, because the same justifications for imposing liability in *Oner* do not exist here, it does not provide authority for imposing successor liability on either Rapid-American or Celotex in this case.

Federal courts have been reluctant to read section 107(a) of CERCLA expansively to include parties who do not fall within its letter, and the Third Circuit's opinion below is inconsistent in principle with numerous holdings in comparable cases. For example, when faced with the question of whether officers and shareholders of companies can be held liable under section 107(a), even though such individuals did not single-handedly dispose of or arrange for disposal of the waste, courts have imposed liability only where such persons have had an active participation in the management of the disposal facility or direct involvement in the disposal of the hazardous wastes. *See, e.g., New York v. Shore Realty Corp.,* 759 F.2d 1032 (2d Cir. 1985) (holding majority shareholder of the facility liable as "owner or

operator" since he participated in management of the facility); *United States v. Conservation Chemical Co.,* 619 F. Supp. 162 (W.D. Mo. 1985) (refusing to enter summary judgment on CERCLA count against corporate officer of corporation which owned and operated the facilities since there was insufficient evidence to demonstrate his personal participation and involvement); *United States v. Wade,* 577 F. Supp. 1326 (E.D. Pa. 1983) (refusing to impose CERCLA liability on corporate officer who personally delivered drums of hazardous substance to site, finding testimony inadequate to establish direct participation in disposal of hazardous waste).

Likewise, courts have not imposed CERCLA liability on parent corporations which themselves do not fall under the letter of section 107(a) unless the parent has control over the management and operation of the contaminating subsidiary. *See Idaho v. Bunker Hill Co.,* 635 F. Supp. 665 (D. Idaho 1986).

The United States District Court for the Central District of California strictly construed this provision and refused to impose liability on the successor, based on the fact that the successor did not itself fall into one of the enumerated categories and that there was no proof that the predecessor did.[10] *Cadillac Fairview/Cadillac, Inc. v. Dow Chemical Company,* 14 Envtl. L. Rep. (Envtl. L. Inst.) 20376 (C.D. Cal. March 5, 1984), *rev'd on other*

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10. The plaintiff in *Cadillac* had brought an action against a number of defendants under 42 U.S.C. §9607 seeking to require them to remove wastes left on his property by a prior owner. One of the defendants, Cabot, Cabot & Forbes Interim ("CCFI"), was the successor-in-interest to entities which previously owned the site on which the hazardous substances were disposed and apparently was also a previous owner itself. The court observed that the only provision on which liability could possibly be based was 42 U.S.C. §9607(a)(2), covering entities who owned or operated the facility at the time of disposal. Reasoning that the defendant was not alleged to have owned or operated the facility at the time the waste was disposed of, the court granted CCFI's motion to dismiss.

grounds, 18 Envtl. L. Rep. (Envtl. L. Inst.) 20470 (D.C. Cir. February 25, 1988).[11]

In the present case, neither Celotex nor Rapid-American had direct or indirect involvement whatsoever either with the disposal of the asbestos waste on the subject property, or with the management of Philip Carey at the time of the alleged disposal. Thus, even under the more expansive constructions of liability under section 107(a) of CERCLA, Celotex is not a responsible party, and therefore cannot and should not be liable for contribution to Smith Land under section 113(f)(1).

C. The Imposition of Successor Liability Under CERCLA Where the Predecessor-Successor Relationship Arises After the Contaminated Property is Sold Could Paralyze Corporate Mergers

The Third Circuit has not set any limits on its holding. Ostensibly it applies to successors to all four categories of potentially responsible parties set forth in section 107(a) of CERCLA, without regard to whether the events which give rise to the successor-predecessor relationship take place before or after the property in question is sold.

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11. In addition to the court in *Cadillac*, two other district courts have confronted the issue of successor liability under CERCLA. The first was the United States District Court for the Eastern District of Missouri in *United States v. Bliss*, 667 F. Supp. 1298 (E.D. Mo. 1987). While that court imposed CERCLA liability on the successor, the case is distinguishable on a number of grounds. The most obvious ground is the fact that the successor continued the operations of its predecessor, maintained the same office, and in fact advertised itself as the predecessor. *Id.* at 1308. The second court to have confronted the issue was the United States District Court for the District of New Jersey in *T & E Industries, Inc. v. Safety Light Corp.*, 680 F. Supp. 696 (D.N.J. 1988). That court also imposed CERCLA liabilities on the successor. As is apparent from the complete absence of any discussion by the court of the propriety of imposing successor liability under CERCLA, that particular issue does not appear to have been raised or briefed by the parties.

Imposing liability on successor corporations where the events leading to successorship take place *after* the sale of property could paralyze corporate mergers. To avoid liability, the party contemplating a merger would be forced to investigate not only the current land holdings of the target company, but also all its prior land holdings and, to continue the reasoning of the Third Circuit, all land holdings ever owned by the predecessor of the target company. Such an investigation would be not only burdensome and expensive, but in many instances inconclusive. Accordingly, in all probability, companies would choose not to merge rather than face the expense and uncertainty such an investigation would undoubtedly yield.

Where the merger which gives rise to the successor-predecessor relationship takes place after the property is sold, obviously only the buyer can perform the requisite investigation of the property at the time of sale. It is therefore far more reasonable to impose CERCLA liabilities on the buyer alone in such circumstances.

Applying this reasoning to the present case, Smith Land, when it purchased the property in 1963, was in a much better position to evaluate the risks involved in purchasing Philip Carey's property than either Celotex or Rapid-American a decade later, when contemplating the mergers involving Philip Carey. Because Smith Land, not Philip Carey, owned the property at that time, neither Celotex nor Rapid-American had any opportunity to inspect the property, nor would they have been able to require Philip Carey to clean up any contamination they might have found had they inspected it.

Accordingly, even if this Court agrees with the Third Circuit's conclusion that section 107(a) of CERCLA should be judicially expanded to include successors to the four groups of potentially responsible parties, an exception should be created for situations where the contaminated property is sold *prior to* the events which give rise to the predecessor-successor relationship.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that a Writ of Certiorari issue to review the judgment of the Third Circuit vacating the district court's entry of summary judgment for The Celotex Corporation and Rapid-American Corporation.

Respectfully submitted,

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APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RULE 28.1 STATEMENTS

Pursuant to Rule 28.1 of the Rules of Supreme Court, the petitioners herein make the following statements disclosing parents, non-wholly owned subsidiaries and affiliates.

The Celotex Corporation:
Jim Walter Corporation (parent)
Rapid-American Corporation:
Riklis Family Corporation (parent)

TEXT OF COURT RULES INVOLVED

Rule 56(c) of the Federal Rules of Civil Procedure provides:

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

TEXT OF STATUTORY PROVISIONS INVOLVED

Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9607(a), provides:

(a) Covered persons; scope

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Section 113(f)(1) of the Comprehensive Environmental Response, Compensation Liability Act of 1980, 42 U.S.C. §9613(f)(1) (Supp. 1987), provides:

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5740 and 87-5741

SMITH LAND & IMPROVEMENT CORPORATION,
Appellant in 87-5740

v.

THE CELOTEX CORPORATION
SMITH LAND & IMPROVEMENT CORPORATION,

Appellant in 87-5741

v.

RAPID-AMERICAN CORPORATION,

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil Nos. 86-1151 & 86-0116)

Argued March 9, 1988
Before: WEIS, GREENBERG and ALDISERT,
Circuit Judges

Filed June 30, 1988

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OPINION OF THE COURT

WEIS, *Circuit Judge.**

This is a suit by a purchaser of land seeking contribution toward expenses incurred in the clean-up of a hazardous waste site. The defendant invoked and the district court accepted the defense of caveat emptor. A review of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-75, convinces us that caveat emptor, though it may affect the amount of an award, is not a permissible defense to liability. We also conclude that the general doctrine of corporate successor liability is appropriate in CERCLA contribution claims. Accordingly, we will vacate the judgment entered in favor of defendants and remand for further proceedings.

Plaintiff owns a tract of land in Plymouth Township, Pennsylvania, on which is deposited a large pile of manufacturing waste containing asbestos. In July 1984, the Environmental Protection Agency informed plaintiff that unless it took steps to alleviate the asbestos hazard the federal government would perform the work and then pursue reimbursement. Plaintiff proceeded to correct the condition to EPA's satisfaction, allegedly incurring costs of $218,945.44.

Before reaching a settlement with the EPA, plaintiff notified defendants of its intention to seek indemnification. Plaintiff asserts that defendants are corporate successors to the Philip Carey Company (Carey), which had created the large waste pile in the course of manufacturing asbestos products. Carey sold the land to the plaintiff's predecessor in 1963.

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* At the time of oral argument on this case, the Honorable Joseph F. Weis, Jr., was an active circuit judge. Since that time, Judge Weis has assumed senior status.

When defendants failed to accept responsibility for clean-up, plaintiff filed suit alleging causes of action under CERCLA and various state law theories including nuisance, unjust enrichment, and common law indemnity. Relying on *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985), the district court, holding that caveat emptor applied, entered summary judgment for defendants. The plaintiff's predecessor, wrote the court, "bought the land in an open, arm's-length" transaction, without concealment. "In the eyes of the law, the plaintiff calculated or must be held to have calculated the risk of future clean-up costs into the amount it was willing to pay for the land." That *Hercules* was precipitated by a state agency acting under state law, from the court's standpoint, did not suffice to distinguish the case from the CERCLA claim at hand.

The court noted that the plaintiff's predecessor was a sophisticated company which had inspected the land on five occasions, known of its past use, and admitted that the pile of waste was a "negative" factor in the decision to purchase the land. Despite the plaintiff's assertion that it lacked knowledge about the hazards of asbestos, the court concluded that the "price plaintiff paid for the land reflected the possibility of environmental risks."

Plaintiff does not now challenge the rulings on the state claims, but appeals only the judgment entered on the federal claim. Plaintiff argues that CERCLA permits only limited and specific defenses and that "caveat emptor" is not among them. Defendants respond that they never owned or conducted any operation on the property and hence cannot be liable. In the alternative, defendants argue that if found responsible on a theory of successor liability, then they may assert the caveat emptor defense against this experienced purchaser.

I.

A number of CERCLA's provisions are pertinent here. Section 9607(a) provides that:

> "Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —
>
> (1) the owner and operator of a . . . facility, [and]
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . .
>
> * * *
>
> shall be liable for —
>
> (A) all costs of . . . remedial action incurred by the United State Government or a State . . .
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . ."

42 U.S.C. §9607(a). Subsection (b) lists available defenses as an act of God, an act of war, or an act or omission of a third party (other than employees or agents of the defendants or in certain contractual relationships with them). *Id.* §9607(b).

Section 9613(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable . . . under section 9607(a)." Such claims "shall be governed by Federal law." In resolving contribution claims, "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *Id.* Furthermore, a person "who has resolved its liability to the United States . . . for some or all of a response action . . . in an administrative or judicially approved settlement may seek contribution from any

person who is not party to a settlement. *Id.* §9613(f)(3)(A).

In short, the current owner of a facility as well as the entity that owned the facility at the time the hazardous substance was deposited are liable under CERCLA for the expense of rectifying the condition. The statute does not list caveat emptor as a defense against initial liability. Contribution may be enforced against one who is liable under the Act, but a court may utilize equitable factors in determining the amount allocated.

Setting aside complicating factors for the moment, if defendants had deposited hazardous substances on the land after passage of CERCLA and thereafter sold the tract, then plaintiff could recover an amount deemed equitable for proper expenses in abating the hazardous situation. On this premise, we review the facts and holding in *Hercules*.

In that case, the state required the landowner to stop the leaching of polluting chemicals from its property in violation of the Pennsylvania Clean Streams Law, Pa. Stat. Ann. tit. 35, §691 (Purdon 1977 & 1988 Supp.). Having expended substantial sums to comply with state law, the current owner sought indemnification from the successor corporation of the entity that had deposited the offending substances.

We proceeded on the assumption that the parties to the suit acted in the capacity of vendor and vendee of land. We held that under Pennsylvania law the plaintiff had no standing to sue for public nuisance, that caveat emptor barred recovery on a private nuisance theory, and that "essentially the same policy considerations that counsel adherence to the rule of *caveat emptor* in this situation militate against shifting the loss to [the defendants] on an indemnity theory." *Hercules*, 762 F.2d at 316, 318.

The record there showed that the plaintiff had carefully inspected the land before purchase and had inquired into its past use. We found it "inconceivable

that the price it offered . . . did not reflect the possibility of environmental risks." *Id.* at 314.

> "Where, as here, the rule of *caveat emptor* applies, allowing a vendee a cause of action for private nuisance for conditions existing on the land transferred – where there has been no fraudulent concealment – would in effect negate the market's allocations of resources and risks, and subject vendors who may have originally sold their land at appropriately discounted prices to unbargained-for liability to remote vendees."

Id. at 314-315.

The ruling in *Hercules* is distinguishable in several significant aspects. Defenses available under state common law are not necessarily allowed by the federal statute. As noted above, CERCLA provides explicitly that contribution claims shall be governed by federal law. The decisions we reached in *Hercules* sitting in diversity, therefore, cannot be transplanted to a CERCLA claim as a matter of course.

The defenses enumerated in section 9607(b) are not exclusive in suits for contribution. Other sections suggest additional defenses in a broad sense; for example, the Act limits to three years the period in which an action may be brought, 42 U.S.C.A. §9613(g) (1983 & 1988 West Supp.). A party which has resolved its liability to the government is not liable for contribution; the settlement may reduce the claim pro tanto. *See id.* §9613(f)(2). In addition, agreements to indemnify or hold harmless are enforceable between the parties but not against the government. *See id.* §9607(e). Moreover, the defenses in section 9607(b) coexist with equitable considerations that may mitigate damages. *See* H.R. Rep. No. 253(I), 99th Cong., 1st Sess. 1, 80 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2862. *See also* Belthoff, *Private Cost Recovery*

Actions Under Section 107 of CERCLA, 11 Colum. J. Envtl. L. 141, 183 (1986).

Although not a defense to a government suit for cleanup costs, caveat emptor if applied between private parties arguably would not contradict the statutory text. Several considerations, however, lead us to conclude that this venerable doctrine is not in keeping with the policies underlying CERCLA. First, caveat emptor completely bars recovery by a purchaser regardless of other equities affecting the parties. That result frustrates congress's desire to encourage clean-up by any responsible party. If fair apportionment of the expense is not assured, it is unlikely that one party will undertake remedial actions promptly when it could simply delay, awaiting a legal ruling on the contribution liability of other responsible parties.

Second, CERCLA authorizes the government to seek reimbursement of response costs from any of the responsible parties, leaving them to share the expense equitably. As the House report recognizes, choosing one defendant from among several can cause ill will between the government and the unlucky party selected. *See* H.R. Rep. No. 253(I), *supra,* at 80, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2862.

Recognizing that case law had established a right of contribution, the House Report stated:

> "This section [9607] clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances. * * * Although the only defenses to liability remain those set forth in Section [9607(b)], courts are to resolve such claims on a case-by-case basis, taking into account relevant equitable considerations."

Id. at 2861-62.

Doctrines such as caveat emptor and "clean hands," which in some cases could bar relief regardless of the degree of culpability of the parties, do not comport with congressional objectives. In the words of one district judge, "the 'unclean hands' doctrine espoused in *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1057 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986), has no place in CERCLA actions." *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285, 1291 n.7 (E.D. Pa. 1987).[1]

CERCLA expressly conditions the amount of contribution on the application of equitable considerations. As *Hercules* explained, if the tract's price is reduced to allow for future environmental clean-up claims, the purchaser should not be entitled to double compensation. Nonetheless, the amount of the discount, if any, the cost of response, and other considerations may enter into the allocation of contribution by the district court in its exercise of discretion.

We conclude, therefore, that under CERCLA the doctrine of caveat emptor is not a defense to liability for contribution but may only be considered in mitigation of amount due.

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1. The duty of inspection implicit in caveat emptor has not been ignored in CERCLA. Congress, however, approached that obligation from a different perspective and imposed stringent limitations. The Act relieves a landowner from initial liability on proof that after "all appropriate inquiry . . . consistent with good commercial or customary practice" the owner had no reason to know of the presence of a hazardous substance. 42 U.S.C. §9601(35)(B). Nothing in the statute, however, proscribes contribution from a previous owner that has been unable to establish the defense or is otherwise found liable.

II.

The elimination of the caveat emptor defense does not resolve all the issues on this appeal. Other factors complicate the ultimate result.

This is not a straightforward suit between vendor and vendee. As defendants point out, they never owned or operated the facility. We assume at this juncture — but absent findings do not determine — that Carey previously owned the land and produced the asbestos scrap pile which precipitated the EPA action. Through a series of transactions beginning in 1967, the interest of Carey apparently settled in the hands of defendants Celotex and Rapid-American. The parties do not dispute these facts in the current procedural posture of the case; however, plaintiff argues that defendants are responsible for Carey's derelictons on a theory of corporate successor liability.

Other corporate reorganizations during the relevant period have not been fully explored in the record. Nevertheless, the factual picture of these transformations that has emerged is clear enough to discuss the general concept of successor liability as it may apply in CERCLA actions.

Corporate successor liability is neither completely novel nor of recent vintage. Blackstone described the continung vitality of a corporation. "[A]ll the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant." 1 W. Blackstone, *Commentaries* *467-69, *quoted in Polius v. Clark Equip. Co.*, 802 F.2d 75, 77 (3d Cir. 1986). Changes in ownership of a corporation's stock will not affect the rights and obligations of the company itself. The corporation survives as an entity

separate and distinct from its shareholders even if all the stock is purchased by another corporation.

In general, when two corporations merge pursuant to statutory provisions, liabilities become the responsibility of the surviving company. "In case of merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues in existence, the latter corporation is liable for the debts, contracts and torts of the former, at least to the extent of the property and assets received, and this liability is often expressly imposed by statute." 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §7121, at 185 (rev. perm. ed. 1983).

Similarly, where a new corporation is created by consolidation, unless otherwise provided by statute, the new company assumes the debts and liabilities of the constituent companies and "is entitled to avail itself of the same defenses as were available to the old companies." *See id.* §7117, at 178.

When no statutory merger or consolidation occurs, but one corporation buys all of the assets of another, the successor wil not be saddled with the seller's liability except under certain conditions. *See Polius,* 802 F.2d at 77; *Hercules,* 762 F.2d at 308. The record here indicates that nothing other than statutory mergers or consolidations occurred; therefore, the sale of assets or the de facto merger doctrines[2] do not appear pertinent.

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2. For commentary on this aspect of successor liability, see Barnard, *EPA's Policy of Corporate Successor Liability Under CERCLA,* 6 Stan. Envtl. L.J. 78 (1986-87); Note, *Successor Corporate Liability for Improper Disposal of Hazardous Waste,* 7 W. New Eng. L. Rev. 909 (1985). The EPA in a 1984 memorandum of its counsel has taken the position that a successor corporation is liable for the acts of its predecessor under a "continuity of business operation approach." EPA Memorandum, "Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites under CERCLA." Courtney M. Price, Assistant Admin. for Enforcement and Compliance Monitoring (June 13, 1984).

It is not surprising that, as a hastily conceived and briefly debated piece of legislation, CERCLA failed to address many important issues, including corporate successor liability. The meager legislative history available indicates that Congress expected the courts to develop a federal common law to supplement the statute. *See United States v. Bliss,* 667 F. Supp. 1298, 1308 n.8 (E.D. Mo. 1987); *United States v. Chem-Dyne Corp.,* 572 F. Supp. 802, 808 (S.D. Ohio 1983).

The concerns that have led to a corporation's common law liability of a corporation for the torts of its predecessor are equally applicable to the assessment of responsibility for clean-up costs under CERCLA. The Act views response liability as a remedial, rather than a punitive, measure whose primary aim is to correct the hazardous condition. Just as there is liability for ordinary torts or contractual claims, the obligation to take necessary steps to protect the public should be imposed on a successor corporation.

The costs associated with clean-up must be absorbed somewhere. Congress has emphasized funding by responsible parties, but if they cannot be ascertained or cannot pay the sums necessary, federal monies may be used.

Expenses can be borne by two sources: the entities which had a specific role in the production or continuation of the hazardous condition, or the taxpayers through federal funds. CERCLA leaves no doubt that Congress intended the burden to fall on the latter only when the responsible parties lacked the wherewithal to meet their obligations.

Congressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost. Benefits from use of the pollutant as well as savings resulting from the failure to use non-hazardous disposal methods inured to the original corporation, its successors, and

their respective stockholders and accrued only indirectly, if at all, to the general public. We believe it in line with the thrust of the legislation to permit – if not require – successor liability under traditional concepts. *See Oner II, Inc. v. E.P.A.*, 597 F.2d 184 (9th Cir. 1979).

As recounted above, because the district court in this case held that the caveat emptor doctrine precluded the plaintiff's recovery, it had no occasion to consider the question of successor liability. Consequently, the record contains no factual findings or rulings on the legal effect of the various statutes which might affect the liability passed on through merger or consolidation.

In resolving the successor liability issues here, the district court must consider national uniformity; otherwise, CERCLA aims may be evaded easily by a responsible party's choice to arrange a merger or consolidation under the laws of particular states which unduly restrict successor liability. *Cf. United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, ____ U.S. ____, 108 S. Ct. 146 (1987). The general doctrine of successor liability in operation in most states should guide the court's decision rather than the excessively narrow statutes which might apply in only a few states.

To summarize, our study of CERCLA persuades us that Congress intended to impose successor liability on corporations which either have merged with or have consolidated with a corporation that is a responsible party as defined in the Act. We will remand to the district court for further proceedings to fully explore that issue in light of the circumstances.

III.

The parties have not briefed nor raised the question of retroactivity as it pertains to the liability of a party for actions which occurred before enactment of CERCLA in 1980, or before passage of the amendments establishing

contribution in 1986. Consequently, we do not rule on that issue but commend it to the district court for review and resolution. *See Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d at 732; *United States v. Rohm & Haas Co.*, 669 F. Supp. 672, 676-77 (D.N.J. 1987); *Mayor of Boonton v. Drew Chemical Corp.*, 621 F. Supp. 663, 668 (D.N.J. 1985); *United States v. Tyson*, 25 Env. Rep. Cas. (BNA) 1897, 1908-09 (E.D. Pa. 1986); *United States v. Price*, 523 F. Supp. 1055, 1071-72 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982). For commentary and a collection of related cases see Blaymore, *Retroactive Application of Superfund: Can Old Dogs Be Taught New Tricks?*, 12 B.C. Envtl. Aff. L. Rev. 1 (1985); Freeman, *Inappopriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 Bus. Law, 215 (1986); Developments, *Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1539, 1555 (1986).

The judgment of the district court will be vacated and the case will be remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5740 and 87-5741

SMITH LAND AND IMPROVEMENT CORPORATION,
Appellant in No. 87-5740

vs.

THE CELOTEX CORPORATION

SMITH LAND AND IMPROVEMENT CORPORATION,
Appellant in No. 87-5741

vs.

RAPID-AMERICAN CORPORATION
(D.C. Civil No. 86-1151)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

Present: WEIS, GREENBERG and ALDISERT, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel March 9, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered September 21, 1987 in D. C. Civil No. 86-0116 and September 22, 1987 in D. C. Civil No. 86-1151, be, and the same are hereby vacated and

the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos

Clerk

June 30, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5740 and 87-5741

SMITH LAND AND IMPROVEMENT CORPORATION,
Appellant in 87-5740

v.

THE CELOTEX CORPORATION
SMITH LAND AND IMPROVEMENT CORPORATION,
Appellant in 87-5741

v.

RAPID-AMERICAN CORPORATION
(D.C. Civil Nos. 86-1151 and 86-0116)

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge,* and SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, ALDISERT and WEIS, *Circuit Judges*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT

/s/ Morton Greenberg

Circuit Judge

Dated: AUG 1 - 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5740/41

SMITH LAND AND IMPROVEMENT CORPORATION,
Appellant

vs.

RAPID-AMERICAN CORPORATION
Appellee in No. 87-5740

and

THE CELOTEX CORPORATION
Appellee in No. 87-5741

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until November 6, 1988.

/s/ Weis

Circuit Judge

Dated: AUG 22 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SMITH LAND AND IMPROVEMENT CORPORATION,	:	
Plaintiff	:	
	:	
vs.	:	CIVIL NO. 86-0116
	:	(Judge Kosik)
RAPID-AMERICAN CORPORATION	:	
	:	
Defendant	:	

MEMORANDUM

This matter is before us on a defense motion for summary judgment which was filed on February 17, 1987. Also pending is the plaintiff's motion to amend paragraphs 25 and 26 of the complaint. Both motions have been referred to United States Magistrate J. Andrew Smyser for a report and recommendation. On June 16, 1987, Magistrate Smyser issued his report in which he recommends that this court grant the plaintiff's motion to amend the complaint and grant the defendant's motion for summary judgment. The plaintiff has filed objections to said report of the Magistrate.

At the outset, the court will grant plaintiff's motion to amend paragraphs 25 and 26 of the complaint. As noted by the Magistrate, this motion of the plaintiff has not been opposed by the defendant. Additionally, the defendant has not objected to the Magistrate's recommendation with respect to the motion to amend.

The relevant facts of this case are as follows: In 1963, the Philip Carey Manufacturing Company conveyed a 160-acre tract of land to Exeter Investment, Inc. At the time of the conveyance, Exeter Investment was a wholly owned subsidiary of the plaintiff, Smith Land &

Improvement Corporation. Subsequent to the conveyance, Exeter Investment merged with the plaintiff company. The plaintiff alleges that prior to the 1963 conveyance, the Carey Company deposited asbestos-containing waste on the conveyed property. In 1984, the United States Environmental Protection Agency informed the plaintiff that the property which it acquired from the Carey Company contained asbestos and that the plaintiff was responsible for the clean-up costs. The plaintiff spent substantial sums of money complying with the EPA's clean-up order. The plaintiff now seeks reimbursement for the clean-up costs from the defendant, Rapid-American Corporation, on the theory that its predecessor, Philip Carey Manufacturing Company, was liable for the clean-up debt.

The plaintiff commenced this action on January 21, 1986. The complaint originally contained seven counts. However, the court dismissed Counts II and III of the complaint on August 12, 1986. In Count I the plaintiff seeks to recover from the defendant its costs to respond to the EPA clean-up order pursuant to the Comprehensive Environmental Response Compensation & Liability Act [CERCLA], 42 U.S.C. §9601, *et seq.*[1] Count IV is a pendent state common law nuisance claim. Count V is a pendent state common law vicarious liability claim. Count VI sets forth a claim for restitution on the basis of

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1. The defendant contends that this is not a case instituted under CERCLA. The plaintiff claims that its case is based upon a cause of action under CERCLA. We agree with the plaintiff that Count I is based upon CERCLA. The CERCLA creates a private cause of action. *See* 42 U.S.C. §9607. *See also Fishel v. Westinghouse Elec. Corp.*, 617 F. Supp. 1531, 1534-1535 (M. D. Pa. 1985). The plaintiff has sufficiently alleged that the defendant is liable to it pursuant to the CERCLA, 42 U.S.C. §9607(a)(2), (3) and (4). *See* amended paragraphs 25-26 of the complaint, Doc. 27. Moreover, the plaintiff claims that the defendant is a responsible party under CERCLA since it owned the property at the time of disposal of the asbestos and it transported asbestos to the property.

unjust enrichment. Finally, Count VII contains a claim for common law indemnity.

In his report, the Magistrate states that the defendant is entitled to summary judgment as to Counts I, IV, V and VII. The Magistrate bases his conclusion upon a recent Third Circuit Court of Appeals case, namely *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1985), *cert. denied,* ____U. S. ____, 106 S. Ct. 184 (1985). The plaintiff contends that the *Philadelphia Electric* case is inapplicable to the instant case. The court has reviewed the *Philadelphia Electric* case and the plaintiff's objections and finds that the stated case is dispositive of the present case with respect to Counts I, IV, V and VII.

In *Philadelphia Electric* the plaintiff bought industrial land from the defendant. Subsequently, the Pennsylvania Department of Environmental Resources [DER] discovered that the plaintiff's land was contaminating the environment. The DER directed the plaintiff to clean-up its land pursuant to the Pennsylvania Clean Streams Law, and the plaintiff did so. Thereafter, the plaintiff brought suit seeking recovery of the monies it spent to clean-up its land claiming negligence, private and public nuisance, and indemnity against the defendant corporation whose predecessor in interest had owned the property which the plaintiff purchased. The plaintiff based its suit on the ground that the defendant's predecessor in interest caused the contamination of ground water and a river during its operation of a chemical plant on the property.

In *Philadelphia Electric,* supra, 762 F.2d at 312, the court stated that the law in Pennsylvania "is that in the absence of fraud or misrepresentation a vendor is responsible for the quality of property being sold by him only to the extent for which he expressly agrees to be responsible. . . . " [Citation omitted]. The court also stated that where, as in the case sub judice, corporations of roughly equal resources contract for the sale of an

industrial property the rule of caveat emptor applies. *Id.* at 313. This is true especially where, as in the instant case, the dispute is over a condition on the land rather than a structure. *Id.* The *Philadelphia Electric* Court further held that a purchaser of real property cannot recover from the seller on a private nuisance theory for conditions existing on the land that was transferred. *Id.* Additionally, no public nuisance cause of action exists against a vendor of industrial property for pollutants existing on the land sold. *Id.* at 316. Finally, the *Philadelphia Electric* Court held that the plaintiff, who was required by the DER to clean up land which it purchased from the defendant, has no indemnity cause of action against the defendant seller or a successor corporation of the seller. *Id.* at 316-317.

The plaintiff does not dispute the findings in *Philadelphia Electric.* Rather, the plaintiff attempts to distinguish *Philadelphia Electric* from the present case. The plaintiff argues that *Philadelphia Electric* does not involve a case brought under CERCLA as does the case at bar. This court concurs with the Magistrate that the *Philadelphia Electric* case is applicable to the present case even though the clean up in the present case was ordered by the EPA under CERCLA and the clean-up in *Philadelphia Electric* was prompted by the DER under the Pennsylvania Clean Streams Law. As this court interprets *Philadelphia Electric,* it is not germane under what environmental law a landowner is directed to clean-up contaminated land.[2] What is important is the court's aforementioned holding in *Philadelphia Electric* pertaining to the past landowner's liability to the present landowner. The EPA in the present case could have

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2. The plaintiff fails to explain how *Philadelphia Electric* is distinguishable from the present case based upon the underlying governmental agency filing the enforcement action. Moreover, the plaintiff has not cited a single case which makes a distinction between a clean-up action initiated under CERCLA as opposed to the Pennsylvania Clean Streams Law.

proceeded against either the plaintiff or the defendant. However, this fact has nothing to do with the plaintiff's right as present landowner to recover from the defendant as former landowner the costs of the clean-up. As stated, caveat emptor is the rule when determining the plaintiff's right to recover its clean-up costs from the defendant. The plaintiff does not dispute the Magistrate's finding that the defendant's predecessor did not conceal the presence of asbestos on the land when the plaintiff's predecessor purchased it. Moreover, there is no evidence in this case which indicates any concealment with respect to the asbestos on the property when it was purchased by plaintiff's predecessor.

The record shows that plaintiff's predecessor acted as a sophisticated and responsible purchaser. It knew of the past use of the land and it inspected the land on more than five [5] occasions before it purchased the land. The plaintiff's predecessor was aware of the quarry holes on the property as well as a 30-foot high pile of material covering twenty [20] acres of the property. The agreement of sale for the property in question also allowed the prospective purchaser, plaintiff's predecessor, to perform test borings at the property before completing the transfer of ownership of the land. The plaintiff's predecessor elected not to conduct any tests on the land. It is clear that the price plaintiff paid for the land reflected the possibility of environmental risks. Furthermore, the plaintiff could have added a provision in the agreement of sale to deal with any required future clean-up costs, but it did not do so.

The plaintiff also claims that the Magistrate erred with respect to his recommendation to dismiss its common law counts by not considering the affidavit of its president, Mr. Richard E. Jordan. The plaintiff states that according to Mr. Jordan's affidavit, the plaintiff was neither involved with asbestos in any way nor was it aware that asbestos was a hazardous material before being so informed by the EPA in 1984. The plaintiff

contends that since at the time when it bought the subject land from the defendant's predecessor it was not a sophisticated purchaser with respect to the hazards of asbestos, the sale was not an arms-length land sale. Therefore, the plaintiff argues that it could not have considered the cost of future clean-up when it purchased the land.

The Magistrate has concluded that the plaintiff's predecessor bought the land in an open, arms-length land sale. The Magistrate states that the plaintiff calculated the risk of future clean-up costs into the purchase price of the land. The court finds no error with the Magistrate's conclusions.

As stated above, plaintiff's predecessor inspected the land more than five [5] times before purchasing it. Plaintiff's predecessor was aware that the land contained a 30-foot high pile of waste which covered twenty [20] acres of the land. In fact, Mr. Jordan, who at the time was Secretary to plaintiff's predecessor, admitted that the pile of waste was a "negative" factor in the decision to purchase the land from defendant's predecessor. Plaintiff's predecessor also had the opportunity to test the land, but it did not do so. Once again, there is no evidence in the record to indicate that the defendant's predecessor tried to conceal anything from the plaintiff's predecessor. Nor does the plaintiff offer any evidence to demonstrate concealment. Therefore, the record is clear that plaintiff's predecessor acted as a sophisticated and responsible purchaser when it bought the land in question from defendant's predecessor.

Accordingly, the court will grant the defendant's summary judgment motion with respect to Counts I, IV, V and VII of the complaint based upon the *Philadelphia Electric* case.

Next, the Magistrate recommends that the defendant is entitled to summary judgment with respect to the plaintiff's unjust enrichment claim contained in

Count VI of the complaint. The plaintiff has objected to this recommendation.

There are two essential elements to establish a claim for unjust enrichment: [1] an enrichment and [2] an injustice resulting if recovery for the enrichment is denied. *Peterson v. Crown Financial Corp.*, 661 F.2d 287, 295 (3d Cir. 1981). The Magistrate states that the plaintiff has failed to meet the first element of an unjust enrichment claim. Specifically, the Magistrate states that the defendant was not enriched just because the government brought an enforcement action against the plaintiff instead of the defendant. The plaintiff contends that the defendant was enriched because it saved the defendant from incurring the costly clean-up expense. The plaintiff also argues that the defendant was enriched because it satisfied a debt and duty of the defendant's.

The court agrees with the Magistrate that both the plaintiff and the defendant were liable to clean up the asbestos on the land. However, just because the EPA chose the plaintiff to do the clean-up work, does not mean that the defendant was enriched. The plaintiff continually argues that the defendant was spared the clean-up costs. Yet the plaintiff fails to realize that it was equally responsible to clean up its land. Additionally, there is no injustice in requiring a landowner to clean contaminated materials from its land and preventing the landowner from recovering against the prior landowner if the condition was obvious at the time of the land sale and the prior landowner did not attempt to conceal the condition. Therefore, summary judgment will be granted in favor of the defendant with respect to Count VI.

Based upon the foregoing, the court will adopt the report of the Magistrate and grant the defendant's motion for summary judgment as to all counts.

An appropriate Order will issue.

ORDER AND JUDGMENT

NOW, this 21st day of September, 1987, IT IS HEREBY ORDERED THAT:

[1] the Magistrate's report dated June 16, 1987 is adopted by the court;

[2] plaintiff's February 17, 1987 motion to amend paragraphs 25 and 26 of the complaint is granted;

[3] defendant's motion for summary judgment is granted as to all counts of the complaint;

[4] judgment is entered in favor of the defendant and against the plaintiff; and

[5] the Clerk of Court is directed to close this case and to send a copy of this Memorandum and Order to United States Magistrate Smyser.

/s/ Edwin Kosik

Edwin M. Kosik
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SMITH LAND AND IMPROVEMENT CORPORATION	:	CIVIL NO. 86-1151
Plaintiff	:	(Judge Kosik)
vs.	:	
THE CELOTEX CORPORATION	:	
Defendant	:	

MEMORANDUM

The plaintiff, Smith Land & Improvement Corporation, filed this action on August 18, 1986 against the defendant, the Celotex Corporation. The facts of this case are identical to another case pending before this court, namely *Smith Land & Improvement Corporation v. Rapid-American Corporation,* Civil No. 86-0116. Both the defendant Celotex and the defendant Rapid-American are successor corporations to a company which sold a tract of land to a predecessor company of the plaintiff. The land sold to the plaintiff's predecessor by the defendants' predecessor contained asbestos waste. In both the present case and the *Rapid-American* case, the plaintiff is seeking recovery from the successor corporations of the original landowner for the costs it incurred in cleaning up the environmental hazards from the land.

The *Celotex* and the *Rapid-American* cases were referred to United States Magistrate J. Andrew Smyser by the court for a report and recommendation on various outstanding motions, including the motions for summary judgment filed by the defendants in both cases. The Magistrate has concluded that the case of *Philadelphia Electric Co. v. Hercules, Inc.,* 762 F.2d 303 (3d Cir. 1985), *cert. denied,* ____US. ____, 106 S. Ct. 184 (1985),

is dispositive of the *Celotex* and *Rapid American* cases. In *Rapid American* this court has already ruled that the *Philadelphia Electric* case warrants the granting of the defendant's summary judgment motion.[1] Since the facts and issues of the instant case are identical to those of the *Rapid American* case, the court, relying upon *Philadelphia Electric,* supra, will adopt herein its September 21, 1987 Memorandum and Order filed in Civil No. 86-0116.[2] Therefore, as the court has held in *Rapid American,* the defendant in the present case is not liable to the plaintiff as a matter of law. Accordingly, the motion for summary judgment of defendant Celotex will be granted and plaintiff Smith Land's motion for partial summary judgment will therefore be denied.

Also pending in the case at bar are the plaintiff's motion to compel discovery and for sanctions, the plaintiff's motion for leave to amend paragraphs 25 and 26 of its complaint, and the defendant's motion for sanctions. The Magistrate recommends that this court should grant the plaintiff's motion to amend its complaint, but deny the plaintiff's motion to compel discovery and for sanctions, and the defendant's motion for sanctions. The plaintiff objects to the Magistrate's recommendations that its motion to compel discovery and for sanctions be denied. The defendant requests that this court adopt the Magistrate's report except for its recommended denial of

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1. *See* September 21, 1987 Memorandum and Order of Civil No. 86-0116, Doc. 40.

2. The court wishes to note that the plaintiff has objected to the Magistrate's report in the case at bar as well as in the *Rapid American* case. However, with respect to the summary judgment motion of defendant Celotex, the plaintiff has adopted the objections it submitted in *Rapid American. See* ¶1 of plaintiff's objections, Doc. 53, Civil No. 86-1151. Because this court considered the plaintiff's objections in its *Rapid American* decision, it will not readdress these same objections in the present case.

the defendant's motion for sanctions. Since no objections were filed against the Magistrate's recommendation concerning the plaintiff's motion to amend its complaint, said motion will be granted.

The court has reviewed the Magistrate's report concerning the remaining outstanding motions and the objections thereto submitted by both parties. The court finds no error with any of the Magistrate's recommendations and shall adopt them in full. As stated above, the court has found merit to the defendant's motion for summary judgment. The present motions are of no consequence with respect to the defendant's entitlement to summary judgment. Based upon this fact alone, the current motions shall be denied as moot.

An appropriate Order will issue.

ORDER AND JUDGMENT

NOW, this 22 day of September, 1987, IT IS HEREBY ORDERED THAT:

[1] the report and recommendation of the Magistrate dated June 16, 1987 is adopted by the court;

[2] plaintiff's motion to amend its complaint is granted;

[3] plaintiff's motion to compel discovery and for sanctions is denied;

[4] defendant's motion for sanctions is denied;

[5] plaintiff's motion for partial summary judgment is denied;

[6] defendant's motion for summary judgment is granted;

[7] judgment is entered in favor of the defendant and against the plaintiff; and

[8] the Clerk of Court is directed to close this case and to send a copy of this Memorandum and Order to United States Magistrate Smyser.

/s/ Edwin Kosik

Edwin M. Kosik
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SMITH LAND AND IMPROVEMENT CORPORATION,	:	CIVIL ACTION NO. 86-0116
Plaintiff	:	
v.	:	(Judge Kosik)
	:	
RAPID-AMERICAN CORPORATION,	:	
Defendant	:	

REPORT OF MAGISTRATE

There are two motions outstanding in this case. One is the defendant's motion for summary judgment, filed on February 17, 1987. The other is the plaintiff's motion for leave to amend the complaint, filed also on February 17, 1987. The motion for summary judgment has been fully briefed and is ready for disposition. A brief in support of the motion for leave to amend was filed, but no opposing brief was filed.

The motion for leave to amend the complaint is not opposed. Rule 401.6, Rules of Court, M.D.Pa. It should be granted for that reason.

The defendant asserts in support of its motion for summary judgment that the following facts are material to the disposition of this case and are not in dispute:

1. On December 17, 1963, Exeter Investment, Inc. purchased a 160-acre tract of land situated adjacent to Exit 25 of the Pennsylvania Turnpike in Plymouth Township, Pennsylvania (the "subject property") from the Philip Carey Manufacturing Company ("Philip Carey").

2. Exeter Investment, Inc. ("Exeter") is Smith Land & Improvement Corporation's predecessor by merger. The merger was accomplished in 1975 when Exeter merged with several other companies into a company known as L.B. Smith of New York,

Inc. and L.B. Smith of New York, Inc. changed its name to Smith Land & Improvement Corporation ("Smith Land").

3. One of the key persons from Exeter involved in the negotiations leading to the purchase was Richard E. Jordan, then Secretary of Exeter and now President of Smith Land.

4. Mr. Jordan inspected the subject property on more than five occasions prior to its purchase. On those occasions he took note of the three quarry holes on the property as well as the 30-foot high pile of material ("Pile") filling Whiting Lake, the subject of this litigation.

5. This 30-foot high Pile covers twenty acres of the property.

6. Mr. Jordan admitted that the Pile was a "negative" factor in the decision to purchase the subject property.

7. The Agreement of Sale for the subject property permitted the purchaser to perform test borings before title passed, but the purchaser did not do so.

8. On December 2, 1974, Mr. Jordan, then Vice-President of Exeter, signed a Land Fill Agreement with Paoli Construction Company, which permitted Paoli Construction Company to dump fill on plaintiff's Plymouth Meeting property.

9. The Land Fill Agreement makes reference to the presence of asbestos on the subject property on the third page, where it describes an area designated for dumping as "an area where asbestos has heretofore been deposited."

10. Following Exeter's merger and subsequent name change to "Smith Land & Improvement Corporation" in June, 1975, Smith Land assumed all of

Exeter's obligations under the Land Fill Agreement with Paoli Construction Company.

11. Rapid-American Corporation ("Rapid-American") is a Delaware corporation with its principal place of business in New York.

12. There was no relationship between Rapid-American and Philip Carey prior to 1963 or during the period Philip Carey is alleged to have disposed of asbestos on the subject property.

13. On November 3, 1972, an Ohio "Rapid-American Corporation" merged with and into Glen Alden Corporation ("Glen Alden") and the survivor of that merger changed its name to "Rapid-American Corporation." On January 30, 1981 Rapid-American Corporation merged into Kenton Corporation, which was incorporated in Delaware, and the survivor of that merger changed its name to Rapid-American Corporation, the defendant herein.

14. On June 1, 1967, 5½ year prior to its merger with Rapid-American, Glen Alden merged with the Philip Carey Manufacturing Company ("Old Carey"). Simultaneously with this merger, Glen Alden transferred all the assets and liabilities it acquired from Old Carey to a newly formed subsidiary. The Philip Carey Manufacturing Company ("New Carey"). In this transaction New Carey, *inter alia*, assumed all of the liabilities of Old Carey. In April of 1970, New Carey merged into Briggs Manufacturing Company, and the survivor of that merger changed its name to Panacon Corporation. On April 17, 1972 Glen Alden sold its controlling stock interest in Panacon to the Celotex Corporation.

15. On or about March 20, 1984, Smith Land received notice from the Environmental Protection

Agency ("EPA") of the presence of asbestos on the subject property.

16. On or about July 31, 1984, the EPA informed Smith Land that it was a potentially responsible party under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9601, *et seq.* and that it would be required to reimburse the federal government for clean-up costs with respect to the asbestos unless plaintiff undertook the clean-up itself.

17. On September 6, 1984, Smith Land responded to the EPA's demand to take action and submitted a plan of remedial measures. In carrying out this plan, Smith Land engaged a contractor in the fall of 1984 to reslope the Pile. By December 3, 1984, Smith Land had spent $87,498.00 in payments to this contractor for resloping work. At some point, the EPA found the resloping work by this contractor unsatisfactory and Smith Land responded by spending an additional $17,500.00 for resloping by a different contractor.

18. Smith Land has thus far spent a total of $218,945.44 on costs in connection with its clean-up efforts. Of this amount, $48,000.00 is for 480 hours of work (at a rate of $100.00 per hour) by Smith Land's president, Richard E. Jordan.

19. On November 20, 1985. Smith Land signed a Consent Agreement and Order of the EPA which formally settled the EPA's claims against Smith Land.

20. On September 30, 1985, Smith Land notified Rapid-American of its intentions to seek indemnification from Rapid-American for its expenses in responding to the EPA's demands.

These facts are admitted by the plaintiff, with these exceptions: (1) the plaintiff corrects the date of purchase to December 13, 1963; (2) the plaintiff, with respect to paragraph 3 above, admits only that Richard E. Jordan was the Secretary to Exeter in 1963 and was involved in the negotiations for the premises; (3) the plaintiff denies, in reference to paragraph 17 above, that the EPA found the grading and sloping to be unsatisfactory, but admits that additional work had to be done to meet all of the EPA's demands; and (4) the plaintiff denies, in reference to paragraph 19 above, that the EPA's claims are settled, and asserts that a future, additional EPA enforcement action is a possibility. Apart from these disagreements over the facts, which for the reasons which follow are not disputes concerning material facts, the plaintiff objects to the relevance of some of the foregoing facts asserted in support of the defendant's summary judgment motion.

The complaint in this case, which was filed on January 21, 1986, contains seven counts. Counts II and III were dismissed by Order of August 12, 1986. Count I sets forth a cause of action under CERCLA, 42 USCS §9607(a)(2)(3) and (4).[1] Count IV sets forth a pendent state common law nuisance claim. Count V sets forth a pendent state common law vicarious liability claim. Count VI sets forth a claim for restitution on the grounds of unjust enrichment. Count VII sets forth a claim for common law indemnity.

Summary judgment is to be granted under Rule 56 of the Federal Rules of Civil Procedure when no material facts are in dispute and as a matter of law under those undisputed facts a party is entitled to judgment. *Sun Refining and Marketing Co. v. Rago,* 741 F.2d 670 (3d Cir. 1984). Here, the parties have constructively agreed that no material facts are in dispute. The plaintiff asserts

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1. See Motion for Leave to File Amendment to Complaint, Doc. 27.

rather that it instead of the defendant is entitled to summary judgment on these facts.

The defendant asserts a number of alternative arguments in support of its summary judgment motion, including that the plaintiff has unclean hands and is estopped from pursuing the claims it now pursues. We conclude that most of the defendant's arguments need not be reached and that the defendant is entitled to summary judgment as to Counts I, IV, V and VII by direct application of Third Circuit precedent to the undisputed material facts presented here. We also conclude that the defendant is entitled to summary judgment as to Count VI for the reasons set forth hereinafter.

The decision of the United States Court of Appeals for the Third Circuit in *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1985), *cert. denied*, ____U.S. ____, 106 S.Ct. 184 (1985) is dispositive of Counts I, IV and VII. In that case, the court noted that under Pennsylvania law a vendor of land is liable in the absence of fraud or misrepresentation for the quality of property that is sold only to the extent that the vendor expressly agrees to be responsible. The court held that the purchaser of an industrial property has no private or public nuisance cause of action against a vendor for environmental contaminants existing on the land. The court held also that the current landowner, who has been required to incur expenses to clean up the land as the result of a governmental agency's action requiring such a clean-up, has no indemnity cause of action against the vendor or a successor corporation of the vendor. Each (the current owner and the successor corporation) being vicariously liable for the condition on the land, the court concluded that equity does not favor shifting the loss away from a sophisticated purchaser who knew of the condition of the land when it was purchased.

The plaintiff presents no persuasive argument that the *Philadelphia Electric* decision is distinguishable or

inapplicable. Much of the plaintiff's brief is devoted to an argument that Rapid-American is the successor to Philip Carey. Plaintiff argues the general liability of a successor corporation for the liabilities of the predecessor corporation. The plaintiff argues that the defendant, had the EPA proceeded against it, would have been liable for the clean-up costs. All of these propositions are true but, under the *Philadelphia Electric* rationale, not relevant. The plaintiff notes that the court in *Philadelphia Electric* did not hold that a party that contaminates land or its successors can escape liability by the expedient of selling the land. That proposition is correct, but the court in *Philadelphia Electric* did clearly hold that as between the successor to the former (contaminating) landowner and the present landowner, there is no liability on the part of the former landowner to the present landowner for clean-up costs absent special circumstances such as a concealment of the offensive condition(s) by the vendor of the land.

The *Philadelphia Electric* decision did not involve a CERCLA cause of action such as is involved here. Here, the clean-up action was brought against the plaintiff by the EPA under CERCLA and Count I of the complaint here is based on CERCLA. But the fact that the clean-up here was prompted by an action by the EPA under CERCLA instead of by the Pennsylvania Department of Environmental Resources under the Pennsylvania Clean Streams Law is not a material distinction for purposes of the application of *Philadelphia Electric.* There, in deciding the question of the past landowner's liability to the present landowner, the court assumed that either of those entities could be held accountable for clean-up costs in an action against it by the governmental agency. The court made it clear that the fact of the past and present owner's liability to the public and to public agencies to accomplish the clean-up is not a significant or even a germane factor in deciding the question of the present landowner's right to recover from

the former landowner for the costs of the clean-up. In the one context, the paramount interest of the public requires that any one of the range of persons reasonably held accountable for the clean-up be so held. In the other context, traditional considerations of *caveat emptor* predominate. The undisputed facts here leave no room for surmise that the presence of asbestos on the land when plaintiff's predecessor bought it was concealed by the defendant's predecessor. It was not. The plaintiff's predecessor bought the land in an open, arms-length land sale. In the eyes of the law, the plaintiff calculated or must be held to have calculated the risk of future clean-up costs into the amount that it was willing to pay for the land. An agreement for the purchase of land could presumably provide for the manner in which monies are to flow as between the parties in the event of future clean-up costs mandated by a public agency. Here, there was no such agreement. Summary judgment for the defendant must be granted by direct application of the *Philadelphia Electric* decision.

With respect to the unjust enrichment claim in Count VI, the defendant asserts entitlement to summary judgment because there is no evidence of an enrichment of the defendant, but only evidence of a detriment to the plaintiff.

In order to recover on a claim for unjust enrichment and restitution, a party must show: (1) an enrichment and (2) an injustice resulting if recovery for the enrichment is denied. *Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981); *Efco Importers v. Halsobrunn*, 500 F.Supp. 152 (E.D. Pa. 1980); *Visor Builders, Inc. v. Devon E. Tranter, Inc.*, 470 F.Supp. 911 (M.D.Pa. 1978); *Belmont Industries v. Bechtel Corp.*, 425 F.Supp. 524 (E.D.Pa. 1976).

In our view, the defendant may not be deemed to have been enriched merely because an enforcement

action has been brought against another party instead of against the defendant.

The fact that one of either of two parties may under the law be held responsible by the public to do an act which costs money does not itself support the inference that the other party who is not so required is enriched.

But even if some inference of an enrichment were possible in such circumstances, a finding of an unjust enrichment would not be possible under the circumstances presented here because such a finding would be inconsistent with the principle of *caveat emptor* which underlies the decision in *Philadelphia Electric* and would therefore be inconsistent with the *Philadelphia Electric* decision. As we understand that decision, it may leave open the possibility of a cause of action by a prior landowner who has been required to pay clean-up costs as against a sophisticated and fully informed current landowner, but it forecloses such a claim by the current landowner against the former landowner.

There is not an injustice in the public requiring a landowner to clean environmental hazards from the land. There is not an injustice in holding the landowner accountable for such a condition and in foreclosing recovery by the landowner against the prior landowner if the condition was known or apparent at the time of the land transfer and there was no misrepresentation. Thus, defendant is entitled to summary judgment as to Count VI.

For the foregoing reasons, it is recommended that the plaintiff's motion to amend the complaint be granted and that defendant's motion for summary judgment as to all remaining counts be granted.

/s/ J. Andrew Smyser

J. Andrew Smyser
United States Magistrate

Dated: June 16, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SMITH LAND AND IMPROVEMENT CORPORATION,	:	CIVIL ACTION NO. 86-1151
Plaintiff	:	(Judge Kosik)
v.	:	
THE CELOTEX CORPORATION	:	
Defendant	:	

REPORT OF MAGISTRATE

This case is for all material purposes indistinguishable on the merits from *Smith Land & Improvement Corporation v. Rapid-American Corporation*, M.D.Pa. Civil No. 86-0116. The defendant Celotex here, like the defendant Rapid-American in that case, is a successor corporation to the Philip Carey Manufacturing Company and other companies which owned the Plymouth Meeting land involved in these cases at the time when asbestos waste was dumped upon the land. In a Report of Magistrate of this date in that case, we have recommended that summary judgment be granted as to all remaining counts in favor of that defendant. We adopt that Report herein and make the same recommendation as to Celotex, the defendant here, whose status in relationship to the plaintiff is materially the same as the status of the defendant in M.D.Pa. Civil No. 86-0116.

In this case, in addition to the defendant's motion for summary judgment, there are the following other outstanding motions: the plaintiff's motion for partial summary judgment, the plaintiff's motion to compel discovery and for sanctions, the plaintiff's motion for leave to amend its complaint, and the defendant's motion for sanctions.

The plaintiff's motion for partial summary judgment seeks summary judgment in plaintiff's favor as to the question of Celotex's liability for all past and future clean-up costs on the land in question. For the reasons stated in our Report of Magistrate in M.D.Pa. Civil No. 86-0116, and more to the point for the reasons stated in *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1985), *cert. denied*, ____U.S. ____ , 106 S.Ct. 184 (1985), the defendant is not liable to the plaintiff as a matter of law and the plaintiff's motion for partial summary judgment should therefore be denied.

The plaintiff's motion for leave to amend its complaint parallels the motion for leave to amend in M.D.Pa. Civil No. 86-0116. Here, the motion for leave to amend is opposed. The proposed amendment to the complaint makes no difference at all with respect to the defendant's entitlement to summary judgment, although Celotex opposes the motion on the grounds of prejudice because it had already filed its motion for summary judgment when Smith Land sought to amend its complaint. Although it has no effect on the outcome of the case, as we understand and apply the applicable law, the plaintiff's motion for leave to amend should be granted to ensure that a review of the court's grant of summary judgment in plaintiff's favor, if that is the court's decision, may go forward on the basis of a consideration of all of the plaintiff's theories of recovery.

A review of the cross motions relating to alleged wrong-doing by the respective opposing parties in the course of discovery and litigation requires the conclusions that; first, none of these contentions and disputes

affect or have any potential to affect the defendant's entitlement to summary judgment; and, second, these motions and their underlying contentions do not need to be resolved in view of the defendant's entitlement to summary judgment.

The only justifications which would arguably warrant the resolution of the cross motions for sanctions would be the preservation of the integrity of the litigation process and the determination of entitlement to attorney's fees. For all other purposes, the motions are clearly moot.

With these considerations in mind, we have reviewed the sixteen instances of alleged discovery abuse on defendant's part raised in the plaintiff's brief and we have reviewed the reasons set forth by the defendant in support of its contention that the plaintiff should be sanctioned.

A review of the motions reveals clearly that both parties have very prematurely resorted to requests for sanctions. The plaintiff finds fault and bad faith in the defendant's responses to various discovery requests by the plaintiff, but in each instance the defendant has provided an explanation for its response which is reasonable at least on its face. The plaintiff's point of view, according to which the defendant has been evasive and untruthful, is not of sufficient dimension to allow for the possibility that its discovery requests, viewed from the defendant's point of view, were not so clear and unambiguous as the plaintiff viewed them to be. The plaintiff also is harshly critical of the failure of the defendant, a successor corporation, to provide facts based upon personal knowledge about the activities of the predecessor corporation, but the plaintiff makes no showing of a continuity of corporate personnel such as would permit answers based upon personal knowledge.[1] In some

1. At page 35 of its brief, plaintiff makes this argument:
Celotex's entire tactic in refusing proper discovery is

matters, the plaintiff accuses the defendant of being evasive in refusing to admit to facts, but the defendant demonstrates the existence of evidence which would support the counter inference which the defendant would advocate. Given the fact that none of the areas of inquiry in which the plaintiff claims the defendant failed to diligently make discovery are material to the question of the defendant's entitlement to summary judgment, and given that the defendant's explanations for its responses are reasonable, it would constitute a waste of judicial resources to go into the plaintiff's allegations in greater depth. Specifically, it would be wasteful to conduct a hearing upon this collateral matter.

The defendant's motion for sanctions is based upon the fact that the plaintiff filed a motion for sanctions, a motion for partial summary judgment and a motion to amend the complaint. Apparently filed in the belief that the best defense is to go on the offensive, this motion in combination with the plaintiff's motion has the potential capacity to entirely divert the court away from adjudicating actual disputes in favor of deciding squabbles between lawyers. The court should not be so diverted. In a case so squarely and properly amenable to a decision based upon directly controlling precedent, no valid purpose is to be served by considering these collateral matters at length.

> exemplified by its interpretation of the word "knowledge" . . . Celotex's definition is frivolous and not made in good faith. How, pray tell, would a corporate entity ever be engaged in "personal observation or experience"? A corporation acts only through its directors, officers and duly appointed agents, including its attorneys.

If, however, none of these persons have personal knowledge of the activities of the predecessor corporation, it would not appear to have been unreasonable for Celotex to indicate that it as an entity did not have personal knowledge. Plaintiff's resort to a motion for sanctions was premature. What was called for was a more pointed subsequent discovery effort which would have either obtained the information sought or established actual bad faith on defendant's part.

Even though the plaintiff's motion for sanctions seems not to state a meritorious basis for sanctions, particularly in view of the defendant's response to it, that alone is not a basis to conclude that it was filed in bad faith. Defendant's counsel might well have construed the plaintiff's discovery requests less rigidly, might well have made reference to information that would have been helpful to plaintiff's position (and such references could have been made in such a manner as to reserve to defendant its own inferences and arguments), and could certainly have generally been more cooperative in discovery. If defendant's counsel had proceeded with discovery in a cooperative manner rather than disclosing no more than was directly, unambiguously and clearly asked for, the plaintiff's motion would doubtless not have been filed. The defendant's motion for sanctions on this basis is, therefore, meritless and deserves no further attention.

The defendant also bases its sanctions motion on the fact that plaintiff sought leave to amend its complaint and the fact that the plaintiff has sought summary judgment. In M.D.Pa. Civil No. 86-0116, the defendant did not even oppose the plaintiff's motion to amend its complaint. Here, the motion to amend is deemed so objectionable as to warrant sanctions. The amended complaint does not affect the defendant's summary judgment theory or its right to summary judgment. The defendant's motion for sanctions on the theory that the plaintiff's motion to amend is in bad faith is without merit. With respect to the plaintiff's motion for summary judgment, we think that the plaintiff's course of action has not been irresponsible or in bad faith. It agrees in essence with the defendant that no material facts are in dispute, and it argues its position that the defendant as a successor corporation to the former landowner is responsible for the asbestos clean-up costs. It agrees implicitly that the case is ripe for resolution by the court by the device of summary judgment. It has not

attempted to defeat summary judgment by attempting to make it appear that some material facts are in dispute.

The plaintiff's legal position in this case lacks foundation, we have concluded, because of the *Philadelphia Electric* decision. The plaintiff asserts that *Philadelphia Electric* is inapposite because that was not a CERCLA case. We think this distinction on balance to be immaterial when weighed against the analysis in *Philadelphia Electric,* but we cannot say that the plaintiff's legal position is frivolous or in bad faith and, moreover, we believe that the plaintiff's implicit acquiescence in the proposition that this case should be resolved by summary judgment affirmatively represents procedural good faith.

For the foregoing reasons, it is recommended that the plaintiff's motion for leave to amend the complaint be granted, that the plaintiff's motion to compel discovery and for sanctions and the defendant's motion for sanctions be denied, that the plaintiff's motion for partial summary judgment be denied and that the defendant's motion for summary judgment be granted.

/s/ J. Andrew Smyser

J. Andrew Smyser
United States Magistrate

Dated: June 16, 1987.